1995

Hate Speech on Campus and the First Amendment: Can They Be Reconciled?

Thomas A. Schweitzer
Touro Law Center

Recommended Citation
27 Conn. L. Rev. 493 (1994-1995)

HATE SPEECH ON CAMPUS AND THE FIRST AMENDMENT: CAN THEY BE RECONCILED?

Thomas A. Schweitzer[*]

I. INTRODUCTION

Protection of expression from infringement by governmental authority was enshrined in the First Amendment to the United States Constitution[1] in 1791. Since the 1920's, the United States Supreme Court, under the influence of such jurists as Justice Louis D. Brandeis,[2] Justice Oliver Wendell Holmes, Jr.,[3] and Judge Learned Hand,[4] has developed from this constitutional guarantee what is perhaps the most far-reaching system of protection of free expression of any country in the world. Although there are a number of traditional exceptions to this protection, such as libel[5] and fraudulent misrepresentation,[6] strict requirements

---

* Associate Professor of Law, Touro College, Jacob D. Fuchsberg Law Center; J.D., Yale Law School. Professor Schweitzer served as Reporter for the conference.

1. The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The United States Supreme Court has held that the First Amendment's prohibitions are binding as well on state governments, *see* Gitlow v. New York, 268 U.S. 652 (1925), and that, of course, includes public, but not private, colleges and universities.

2. *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

3. *See* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

4. *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (Opinion of Hand, J.), *rev'd*, 246 F. 24 (2d Cir. 1917).

5. Actions for libel or slander were long thought to be immune to any First Amendment limitations. *See, e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697, 719 (1931). But the Supreme Court, in New York Times Co. v. Sullivan, 376 U.S. 255 (1964), and its progeny imposed significant First Amendment restrictions on the law of defamation in cases brought by public officials and public figures. Defamation actions brought by other private plaintiffs, however, were unaffected. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985); *see also* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 6.02(1)(b) (1994).

6. The prevailing view is that factually false statements are not entitled to First Amendment protection. The Supreme Court has stated that "there is no constitutional value in false statements of fact," Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and that "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint." Bates v. State Bar Ass'n, 433 U.S. 350, 383 (1977). *See also* SMOLLA & NIMMER, *supra* note 5, § 11.01(4)(b) (sec-

must be satisfied before speech, however wrongheaded, erroneous, or even hateful in its character, can be restricted or penalized.

This constitutional shield has stimulated both public debate and court challenges. Some protected speech, of course, is offensive and even hateful to various listeners, but it has traditionally been recognized that this, by itself, does not justify its suppression.[7] In recent years, however, a major controversy has raged over the question of whether it is permissible for government entities to curb "hate speech," understood as speech that demeans or expresses hostility or contempt towards target groups based on their race, religion, ethnic background, sexual orientation, or other identifying characteristics.[8] This controversy has attracted both judicial and academic attention.[9]

---

tion entitled "Fact v. Non-Fact").

7. The Supreme Court has declared: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers." Street v. New York, 394 U.S. 576, 592 (1969) (citing supporting precedent).

8. The cliché "sticks and stones can break my bones but names will never hurt me" sums up one traditional view of "hate speech" which discounts the power of mere words to inflict harm. This saying is of course untrue, unless one disregards the serious psychic injury which hate speech can inflict on its victims. Frederick Schauer acknowledges that being called "names" can indeed hurt someone but maintains that, in contrast to the common assumption that speech is protected because it is harmless, it should be protected despite the harm which it may cause. Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 815 (1992).

9. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (holding that a city ordinance prohibiting bias-motivated disorderly conduct violates First Amendment because it restricts only communications concerning certain disfavored topics, thus constituting content-based discrimination.); UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (finding that university hate speech code violates First Amendment because it is overbroad and excessively vague); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (same).

Despite the relative paucity of reported court decisions concerning campus hate speech codes, a great number of law review articles have been published on the subject. *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991); Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL OF RTS. J. 179 (1994); Lawrence Friedman, *Regulating Hate Speech at Public Universities After* R.A.V. v. City of St. Paul, 37 HOW. L.J. 1 (1993); Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C. & U.L. 573 (1990); Jens B. Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 HASTINGS COMM. & ENT. L.J. 599 (1990); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); Robert A. Sedler, *The Unconstitutionality of Campus Bans on 'Racist Speech:' The View From Without and Within*, 53 U. PITT. L. REV. 631 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484; James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991); Nicholas Wolfson, *Free Speech and Hateful Words*, 60 U. CIN. L.

The contentious debate over the constitutional status of hate speech and the efforts of colleges and universities to impose official sanctions on such speech were the focus of a recent conference, jointly sponsored by The Center for First Amendment Rights, Inc.[10] and the University of Connecticut School of Law and entitled "Hate Speech on Campus and the First Amendment—Can They Be Reconciled?"[11] Attorney Milton Sorokin, President of the Center, served as Conference Chairperson, and Dean Hugh Macgill[12] of the University of Connecticut School of Law served as the Moderator. The panelists, all with First Amendment expertise, included William M. Chace, then President of Wesleyan University, Professor Nicholas Wolfson of the University of Connecticut School of Law,[13] Professor Martin Margulies of Quinnipiac College School of Law,[14] and Attorney Ralph G. Elliot, a practicing attorney and adjunct professor at the University of Connecticut School of Law,[15] who served as Interlocutor.

The purpose of the conference was to explore the legal and practical ramifications of efforts to curb or penalize "hate speech" on college

---

REV. 1 (1991).

10. The Center for First Amendment Rights, Inc., a tax exempt, charitable organization, was organized around an educational mission: to educate students in both public and private elementary and secondary schools on the First Amendment, its meaning, and its importance to a free society. Working in collaboration with the University of Connecticut School of Law, its faculty and students, the Center also acts to protect and enforce First Amendment Rights as well as to sponsor scholarship in the area. As part of its educational efforts, the Center highlights First Amendment issues for the general public, sponsoring educational symposia, lectures and discussion groups.

11. The conference was held on Law Day, May 2, 1994, at the University of Connecticut's West Hartford campus. The Center for First Amendment Rights, Inc. gratefully acknowledges a gift from the Alexander Goldfarb Foundation, through its trustee, James Kinsella, Esq., which helped make the Hate Speech Conference possible.

12. Dean Macgill is a board member and officer of The Center for First Amendment Rights, Inc.

13. Professor Wolfson, the first Ellen Ash Peters Professor at the University of Connecticut School of Law, is the author of several works in First Amendment jurisprudence. *See* NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC (1990); Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS U. L.J. 379 (1993); Wolfson, *supra* note 9. Professor Wolfson is also a director of The Center for First Amendment Rights, Inc.

14. Professor Margulies, a national board member of the American Civil Liberties Union, appeared as amicus curiae in a successful challenge to the University of Connecticut hate speech code. *See* Wu v. University of Conn., No. Civ. H-89-649 PCD (D. Conn. 1989). The controversy surrounding the University of Connecticut's speech code is discussed at length *infra* note 69. Professor Margulies is also a director of The Center for First Amendment Rights, Inc.

15. Mr. Elliot is a partner in the law firm Tyler Cooper & Alcorn and author of *Constitutionalizing the Right to Freedom of Information: A Modest Proposal for the Nations of Central and Eastern Europe*, 8 CONN. J. INT'L L. 327 (1993).

campuses. This article summarizes and analyzes the views presented by the participants and the experiences they recounted. It thereby attempts to contribute to the debate concerning the broader question of whether campus hate speech codes are either desirable or constitutional.

II. THE FIRST AMENDMENT AND THE EXPRESSION OF PREJUDICE AND HATRED

Racial and ethnic prejudices have long been common in our heterogeneous society with its legacy of slavery, and those attitudes have found expression in myriad forms. Recent years, though, seem to have witnessed an increase, both in volume and virulence, of such expression on our nation's college campuses. The expansion of educational opportunities for minorities and other traditionally disadvantaged groups, and their increased enrollments in colleges and universities, have coincided with a regrettable growth in the number of "bias incidents" on campuses, in which members of such groups have been victimized because of their race, religion, or ethnicity.[16] The manifestation of such attitudes by college students, who are presumably open-minded and in search of enlightenment through higher education, is particularly disturbing to many observers.

Bias incidents involving physical violence were, of course, already violations of both the law and campus regulations before the advent of hate speech codes. An influential group of commentators, however, has argued that existing prohibitions against campus misconduct do not go far enough—that further sanctions against even purely verbal assaults are essential to maintain a suitable environment for learning.[17] It is

16. Examples of such incidents can be found in both Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 348 n.6 (1991); and Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332-33 n.71 (1989).

17. The most prominent academic champions of penalizing hate speech on campus include Charles Lawrence, Richard Delgado, and Mari Matsuda. In justifying hate speech codes, Professor Lawrence has invoked the landmark United States Supreme Court decision declaring public school racial segregation unconstitutional, Brown v. Board of Education, 347 U.S. 483 (1954), which he reinterprets as an attack by the Court on hate speech. *See* Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. Professor Delgado has authored several articles addressing "hate speech," including: Delgado, *supra* note 16; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance Changes So Slowly,"* 82 CAL. L. REV. 851 (1994); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994); and Richard Delgado, *Words that Wound: A Tort Action for Racial*

commonly contended that hate speech, which involves verbal expressions of hostility and contempt motivated by the race, religion, ethnic background, or sexual orientation of its victims, violates its victims' right to equal protection of the law guaranteed by the Fourteenth Amendment (at least as far as public institutions are concerned).[18] The

---

Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982). His 1982 article, *Words That Wound*, in which he argued that hate speech is really a form of assault constituting the tort of intentional infliction of emotional distress, provided early inspiration for the hate speech code movement; indeed, he was one of the three law professors who assisted the University of Wisconsin's Board of Regents in developing that University's hate speech code. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991) (acknowledging Richard Delgado's assistance in developing the University of Wisconsin's speech code). Professor Matsuda goes a step further than Delgado and endorses formal criminal and administrative sanctions for racist speech. Her position is predicated both on the severe harm such speech causes victims and on the emerging standard of international law criminalizing racial hate messages exemplified by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. The United States has signed, but not ratified, this convention. *See* Matsuda, *supra* note 16, at 2321, 2326-48, 2371, 2380. Feminist writers such as Catharine MacKinnon who attack discrimination against women in all its forms furnish a close parallel to opponents of hate speech on campus. While the feminist cause might seem distinct from the campaign against hate speech, because women represent at least half the population and most women are not members of racial or ethnic minority groups, there are actually close philosophical affinities between the two movements. The leading theorists of the two camps have influenced one another, both through their writings and their willingness to place limits on freedom of expression. For instance, Professor Catharine MacKinnon advocates a ban on pornography because of her belief that it promotes rape, sexual harassment, prostitution and child sexual abuse. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16 (1985) [hereinafter MacKinnon, *Pornography*]; Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991). MacKinnon and Andrea Dworkin, another feminist, drafted an antipornography ordinance that was enacted with some modifications by Indianapolis, Indiana, and Bellingham, Washington. Courts held both ordinances unconstitutional. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

18. Central to Charles Lawrence's position, for example, is the view that the racial segregation outlawed in Brown v. Board of Education, 347 U.S. 483 (1954), was "speech," and that the principal purpose of such segregation was to convey the idea of white supremacy, which is so deeply ingrained in our culture: "Racism is both 100% speech and 100% conduct." Lawrence, *supra* note 17, at 444. Thus, the essence of *Brown*, according to Lawrence, was not to regulate conduct but rather to outlaw official, government-enforced racist speech. Lawrence states:

> *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon blacks, and this badge communicates a message to others in the community, as well as to blacks wearing the badge, that is injurious to blacks. Therefore, *Brown* may be read as regulating the content of racist speech."

Id. at 439-40 (footnotes omitted). A basic tenet of First Amendment law is, of course, that speech cannot normally be regulated or restricted based on its content. *See, e.g.*, Clark v. Com-

equal protection violation occurs, it is argued, because hate speech inflicts substantial injury on members of unpopular groups and hinders them from effectively participating in the school community, each member of which is entitled to be treated with dignity and respect, even by those who vigorously oppose his or her views.[19] According to this view, the constitutional right to equal educational opportunities must be balanced against the constitutional right of free speech, and the former must ultimately be accommodated in the form of speech codes at the expense of absolute freedom of expression.

One of the most influential First Amendment doctrines justifying maximum freedom of speech is premised on the concept of a "free marketplace of ideas."[20] According to this doctrine, it is desirable that

---

munity for Creative Non-Violence, 468 U.S. 288 (1984). But *Brown*, according to Lawrence, carved out an important exception to this rule: "Thus *Brown* and the anti-discrimination law it spawned provide precedent for my position that the content regulation of racist speech is not only permissible but may be required by the Constitution in certain circumstances." Lawrence, *supra* note 17, at 449. Lawrence also argues that "[w]hen racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons, then it falls within the 'fighting' words exception to first amendment protection." *Id.* at 451 (footnote omitted). *See infra* notes 25-26 and accompanying text.

In the same issue of the *Duke Law Journal* as Lawrence's article, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, an article by Nadine Strossen, General Counsel to the American Civil Liberties Union, responded to and refuted Lawrence's position in favor of hate speech codes. *See* Strossen, *supra* note 9. Strossen denied that *Brown* provides support for government regulation of private racist speech, since it curbs what *government* does (whether racial segregation is characterized as speech or conduct), whereas hate speech codes restrict speech by *private individuals*. *See id.* at 541. While the Stanford University hate speech code that Lawrence supported was limited in scope, Strossen feared that adoption of more sweeping speech prohibitions endorsed by Lawrence would have radical consequences for First Amendment law. "The rationales that Professor Lawrence advances for the regulations he endorses are so open-ended that, if accepted, they would appear to warrant the prohibition of *all* racist speech, and thereby would cut to the core of our system of free expression." *Id.* at 492. According to Strossen, Lawrence's recommended speech prohibitions exceed the bounds of the fighting words doctrine and any other exception to speech protection; they would chill protected speech, and they would not effectively counter the underlying problem of racism and could even aggravate it, because they attack racist speech rather than the root causes of racism, of which such speech is a mere symptom.

19. The psychic trauma and injury suffered by the victims of hate speech are described by Charles Lawrence in *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *supra* note 17, at 451-55, 461-65, and by Mari Matsuda in *Considering the Victim's Story*, *supra* note 16, at 2335-41.

20. Perhaps the first to apply this concept to First Amendment jurisprudence was Justice Holmes: "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130-41, 153-54

conflicting ideas compete for the support of the listener, and the most effective and appropriate way to combat error and false ideas is not by censorship, but rather by additional, more enlightened speech. Some proponents of this idea believe that truth inevitably triumphs over falsehood in such a fair contest, as the great poet and philosopher John Milton predicted over three centuries ago.[21]

Supporters of hate speech codes, however, tend to be skeptical of Milton's assumption. They deny that the contest is truly fair, given the power disparities that separate whites from non-whites in our society. Those disparities, they maintain, tend to intimidate the disempowered targets of hate speech into silence.

In addition, these commentators maintain that the contempt that motivates statements of hatred against racial and ethnic minorities and homosexuals is linked to deep-seated emotional attitudes and is thus impervious to the kind of rational persuasion envisioned by proponents of the "free marketplace of ideas."[22] Thus, in their view, it is futile for the victims of hate speech to respond and attempt to rebut the bias it

---

(1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

21. "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" JOHN MILTON, AEROPAGITICA 74 (Alex Murray & Son 1868).

Because of what he regards as the "epidemic" of largely unconscious racism that infects the marketplace of ideas and renders it "dysfunctional," Lawrence, *supra* note 17, at 468-69, Lawrence does not share Milton's optimism that truth will triumph in the marketplace. He comments:

> Blacks and other people of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite. We have seen too many demagogues elected by appealing to America's racism . . . . The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade.

Id. at 467-68.

22. According to one Black writer,

> I think of prejudice as an infectious disease. There is no reasoning with hate. It is irrational. Racism and prejudice of every kind are forms of psychosis; flaws in the human psyche, which make those who suffer from them dangerous.
>
> From my perspective as a member of a group threatened by the resurgence and growing violence of white supremacy groups, the threat to my liberty and my safety justifies a minor limitation on the freedom of a Skinhead or member of the Aryan Brotherhood to engage in hate speech.

Deborah Waire Post, *Race Riots and the Rule of Law*, 70 DENVER U. L. REV. 237, 241-42 (1993).

embodies. Instead, the psychological injury that hate speech inflicts is not compensated for by any realistic opportunity for social dialogue which ostensibly might lead more enlightened ideas to prevail. Furthermore, the hatred and contempt that hate speech manifests assault the self-respect of its victims and can fundamentally undermine their ability to function in the academic community. Accordingly, these commentators conclude, campus codes that restrict or prohibit hate speech are necessary in order to protect the human and civil rights of its victims.

The United States Supreme Court has never specifically adjudicated the constitutionality of a campus hate speech code. However, its 1992 decision in *R.A.V. v. City of St. Paul,*[23] which struck down a municipal hate speech ordinance, sharply restricted the permissible scope of any hate speech code adopted by a public body, such as a public university.[24] Prior to *R.A.V.*, the case most closely analogous to that presented by campus hate speech prohibitions was *Chaplinsky v. New Hampshire*,[25] in which the Court held that a municipality could legiti-

---

23. 112 S. Ct. 2538 (1992).

24. R.A.V., a teenager, was convicted of burning a cross on the lawn of a neighboring black family and thereby violating the St. Paul Bias-Motivated Crime Ordinance, which read:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti [sic], including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541 (quoting from MINN. LEGIS. CODE § 292.02 (1990)).

Justice Scalia's opinion for the Court held that the ordinance was unconstitutional because it impermissibly discriminated on the basis of content, *i.e.*, it penalized only those symbols or displays, amounting to "fighting words," that insulted or provoked violence "on the basis of race, color, creed, religion or gender." *Id.* at 2547. The ordinance did not target those who utilized symbols or displays similarly constituting "'fighting words'" to promote the opposite viewpoint, i.e., in favor of racial or religious tolerance, or "'to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality . . . .'" *Id.* As a result, the ordinance was found unconstitutional because it embodied not only content discrimination but "actual viewpoint discrimination." *Id.*

25. 315 U.S. 568 (1942); *see also* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985). In *Chaplinsky*, the Supreme Court upheld the defendant's conviction for violating a New Hampshire ordinance penalizing the utterance of "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place . . . ." 315 U.S. at 569. Chaplinsky had called the Rochester city marshal "a God damned racketeer" and "a damned Fascist." *Id.* In a conclusory and rather terse declaration that is largely dictum, the Court stated,

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . [S]uch utterances are no essential part

mately ban "fighting words," i.e., "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[26] Several scholars, including Professor Charles Lawrence, have invoked the "fighting words" exception to justify hate speech codes, arguing that hate speech falls within the fighting-words category, and can therefore be proscribed.[27]

The two lower courts that, to date, have adjudicated university hate

---

> of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnotes omitted).

The continued validity of *Chaplinsky* appears quite doubtful fifty years later. As one authority observes, "This mechanical and conclusory approach to the First Amendment, based upon the mere recitation of 'certain well-defined and narrowly limited classes of speech,' has now largely been discredited and abandoned." SMOLLA & NIMMER, *supra* note 5, § 3.04(2), at 3-101 (1994). Much of the above dictum from *Chaplinsky* is no longer good law. For instance, speech that is merely "lewd" is protected by Cohen v. California, 403 U.S. 15, 20 (1971) and Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988), and the permissible scope of libel claims, especially by public officials, has been severely restricted by New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Moreover, the Court has effectively deleted "[words] which by their very utterance inflict injury" from the *Chaplinsky* holding. In Gooding v. Wilson, 405 U.S. 518 (1972), the Court reversed, on First Amendment grounds, the conviction of an appellant who had said to police officers, "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 520, n.1. (Not surprisingly, Justice Blackmun, dissenting in *Gooding*, accused the majority of "merely paying lip service to *Chaplinsky*." *Id.* at 537 (Blackmun, J., dissenting). *See also* United States v. Eichman, 496 U.S. 310 (1990) (flag burning conviction reversed); Texas v. Johnson, 491 U.S. 397 (1989) (same).

In the more than fifty years since it decided *Chaplinsky*, the Supreme Court has overturned every single fighting words conviction that it has reviewed. Gerald Gunther comments, "One must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found to be apt in practice." GERALD GUNTHER, CONSTITUTIONAL LAW 1073 (12th ed. 1991). Only obscenity remains intact among the categories deemed in *Chaplinsky* to be undeserving of First Amendment protection, plus a remnant of the "fighting words" doctrine limited to utterances which almost certainly will lead to immediate violence. Thus, the *Chaplinsky* "fighting words" doctrine is, for Charles Lawrence, a frail reed upon which to rest his legal justification of government regulation of racist speech.

26. *Chaplinsky*, 315 U.S. at 572.

27. Lawrence, *supra* note 17, at 451-52. Lawrence states:

> Face-to-face racial insults, like fighting words, are undeserving of first amendment protection for two reasons. The first reason is the immediacy of the injurious impact of racial insults. The experience of being called "nigger," "Jap," or "kike" is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present.

Id. at 452 (footnotes omitted). (The second reason cited by Lawrence is that racial insults disserve the First Amendment's purpose of fostering the greatest amount of speech; they function as a preemptive strike that is unlikely to foster dialogue. *Id.*).

speech code cases both struck down the codes as unconstitutional restrictions on freedom of speech.[28] In *Doe v. University of Michigan*,[29] the plaintiff was a graduate student at the University of Michigan in biopsychology, the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. In response to what it viewed as a rising tide of racial intolerance and harassment on campus, the university's governing Board of Regents in 1988 adopted a "Policy on Discrimination and Discriminatory Harassment," whose quite broad terms plainly outlawed hate speech.[30] Doe, who was a teaching assistant in the University's "Comparative Animal Behavior" course, sought a declaratory judgment that the code was unconstitutional and an injunction against its enforcement, alleging that he feared that the discussion in class of controversial theories positing biologically based differences between sexes and races might be deemed "sexist" or "racist" and as such a violation of the Policy. The court concluded that a realistic threat of enforcement of the Policy against Doe gave him standing to challenge it, and it went on to find the Policy overbroad both on its face and as applied, and unconstitutionally vague as well.[31]

---

28. UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). As this article was going to press, a third court struck down a university hate speech code. The Santa Clara County Superior Court in California held that a Stanford University code banning insults based on race and sex violated the First Amendment because of overbreadth and content-based discrimination. A 1992 California statute forbade private universities to restrict speech that would be protected off campus, and the court upheld the statute and its application to the Stanford case. *Court Overturns Stanford Code on Bigoted Speech*, N.Y. TIMES, March 1, 1995, at B8 (The plaintiff in this case is Robert J. Corry. Judge Peter Stone decided the case on Feb. 28, 1995.).

29. 721 F. Supp. 852 (E.D. Mich. 1989).

30. The Policy contained two parallel parts. The first authorized punishment for:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>
> a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Id. at 856. The second part targeted sexual harassment but otherwise contained essentially the same terms.

31. The court's conclusion was influenced by its determination that the University of Michigan Policy had already been applied to penalize three instances of "protected speech": 1. a

UWM Post, Inc. v. Board of Regents[32] was a similar case. There, the University of Wisconsin Board of Regents, concerned about incidents of "discriminatory harassment" at its campuses, adopted in 1989 the *Policy and Guidelines on Racist and Discriminatory Conduct*, which essentially outlawed hate speech.[33] At least nine students were sanctioned pursuant to the policy.[34] A student newspaper, The UWM Post,

---

social work graduate student's statement in class that he believed homosexuality was a disease and that he intended to develop a counseling plan to help change gay clients to straight; 2. a business administration student's reading in class of an allegedly homophobic limerick that ridiculed a well-known athlete; and 3. the statement of a pre-dentistry student who was enrolled in a particularly difficult preclinical dentistry class that he had heard that minorities had a hard time in the course and were not treated fairly, whereupon the minority instructor of the course filed a complaint, contending that the comment was unfair and hurt her chances for tenure. *Id.* at 865-66.

In addition, the University Office of Affirmative Action had issued a guide about "discrimination and discriminatory harassment" by students that purported to be an authoritative interpretation of the Policy. The guide listed, inter alia, the following examples of sanctionable conduct: "Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian"; "You exclude someone from a study group because the person is of a different race, sex, or ethnic origin than you are"; and "You display a confederate flag on the door of your room in the residence hall." *Id.* at 858. While the University later withdrew the guide, stating that it was inaccurate, the court concluded from it, and other statements by University officials, that the Policy was intended to sanction speech that was merely offensive. *See supra* note 9 and accompanying text.

32. 774 F. Supp. 1163 (E.D. Wis. 1991).

33. *Id.* at 1165. The Policy provided in relevant part:

> UWS 17.06 Offenses defined. The university may discipline a student in non-academic matters in the following situations. (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual, or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

Id. Professor Richard Delgado, then at the University of Wisconsin Law School, and two of his colleagues helped draft the Policy, which applied to all 26 of the state university campuses. *Id.* at 1164. The Policy was located at § 17.06(2) of the Wisconsin State Administrative Code. *Id.* at 1166. (University of Wisconsin regulations have the status of state law in Wisconsin).

34. While some of the nine were guilty of violent verbal attacks on members of minority groups, others had engaged in merely offensive, but not violent, speech. At the University of Wisconsin-Oshkosh, for example, a student was disciplined for telling an Asian-American student: "It's people like you—that's the reason this country is screwed up," "you don't belong here," and "Whites are always getting screwed by minorities and some day the Whites will take over." *Id.* at 1167 (citations omitted). In another case, the University of Wisconsin-Stevens Point placed on probation for eight months a student who had "harassed a Turkish-American student by impersonating an immigration official and demanding to see immigration documents." *Id.* While this conduct was undoubtedly annoying harassment, it seems at most a marginal violation of the Policy.

brought a declaratory action alleging that the policy unconstitutionally infringed its freedom of speech and seeking a permanent injunction against its enforcement. The court struck down the policy, making the following findings: that the policy impermissibly regulated speech on the basis of content; that it was unduly vague because it left unclear whether speech, to be violative, must actually demean the listener or merely be intended to do so; that it was overbroad because it targeted otherwise constitutionally protected speech; and that the policy did not restrict only "fighting words" because it penalized statements not likely to provoke a violent response.[35]

The weight of legal opinion is that both the Michigan and Wisconsin cases were correctly decided, and that it is exceedingly difficult to draft a university hate speech code that can pass constitutional muster.[36] Controversies involving hate speech and administrative attempts to combat it, however, have continued to roil college and university campuses. A recent incident of purported "hate speech" on campus, the "water buffalo" incident at the University of Pennsylvania, was raised by Interlocutor Ralph Elliot and served as an example upon which to focus discussion at the Hartford conference. In that case, several black sorority members were returning to their dormitory late at night and were making a great deal of noise. Neighboring students yelled for them to "keep quiet," and some shouted racial epithets. An Israeli exchange student who speaks fluent Hebrew called the women "water buffaloes" and suggested that they belonged in a nearby zoo. When he was pursued for allegedly violating the University of Pennsylvania Hate Speech Code, he claimed that he had merely translated into English a Hebrew term for "offensive person" and that it was not a racist epithet. When the Israeli student was brought up on administrative charges, the editorial storm that broke out in the national press, resulted in the black sorority members dropping their complaints.[37]

---

35. *Id.* at 1168-81.

36. Commenting on *Doe v. University of Michigan*, however, a leading authority holds open the possibility of a constitutional university hate speech code in a narrow environment:

> It is still possible that a narrowly crafted campus regulation, applying less speech-protective rules to settings such as dormitories, might be upheld if such settings were deemed to be outside the "public forum" of a student, in which such principles as the "captive audience doctrine" might dictate that the constitutional balance swing more toward the privacy of the student and less toward the free speech rights of the speaker . . . .

SMOLLA & NIMMER, *supra* note 5, § 6.02(5) n.237.

37. Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 221 (1993).

A second hypothetical example of "hate speech," intended to identify conduct which would violate the speech code at Wesleyan University, was introduced by President Chace: a situation in which one student follows another student on campus for weeks, saying "You are a worthless Nigger and I don't want you here."[38]

III. COLLEGE AND UNIVERSITY HATE SPEECH CODES

Press accounts are nearly unanimous in reporting that bias incidents against racial, religious, and ethnic minorities and homosexuals have become increasingly common in recent years on the nation's campuses.[39] Scores of colleges and universities have responded by instituting hate speech codes.[40] While some institutions have abandoned their hate speech codes in the wake of *Doe*,[41] *UWM Post*,[42] and *R.A.V.*,[43] others have attempted modification in order to preserve them. The controversy concerning the constitutionality of outright bans or more qualified restrictions on "hate speech" continues in the academic community.

A. *President William F. Chace: A College President's View*

The First Amendment views of the only non-lawyer on the conference panel, William F. Chace, were largely forged by his personal experiences with two campus free speech controversies during periods

---

38. *See infra* text accompanying note 46.

39. *See, e.g.*, Gilbert Paul Carrasco, *Hate Speech and the First Amendment: On A Collision Course?*, 37 VILL. L. REV. 723, 735 (1992) (citing U.S. COMM'N ON CIVIL RIGHTS, BIGOTRY AND VIOLENCE ON AMERICAN COLLEGE CAMPUSES 3-11 (1990)); Delgado, *supra* note 16, at 343-44 n.2 (citing sources); Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709, 709-10 n.1 (1994) (citing sources).

40. Carrasco, citing statistics from the Carnegie Foundation for the Advancement of Teaching, and writing in 1990, stated that approximately 200 universities had enacted hate speech codes. Carrasco, *supra* note 39, at 735. According to a 1991 newspaper article, "100 to 200 of the nation's 3,600 colleges and universities enacted speech codes." Linda P. Campbell, *College Debate: Free Speech vs. Freedom from Bigotry*, CHI. TRIB., Mar. 18, 1991, at 1, *quoted in* Comment, *Sticks and Stones May Break My Bones, But Words Can Never Hurt Me: Regulating Speech on University Campuses*, 76 MARQ. L. REV. 265, 266-67 nn.10, 14 (1992). At the Hartford conference, Professor Nicholas Wolfson stated that some 700 colleges and universities had enacted hate speech codes. Congressman Henry Hyde and George F. Fishman provide a source for the hate speech codes of fourteen public and fifteen private colleges and universities. *See* Henry J. Hyde & George F. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1470-71 nn.5, 6 (1991).

41. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

42. UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).

43. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

of turmoil: first, as a graduate student at University of California-Berkeley during the late 1960s; and second, as President of Wesleyan University from 1988 to 1994. President Chace emphasized heavily the importance of an atmosphere of comity and civility on campus to learning and academic discourse. He appeared to cautiously endorse the use of hate speech codes as a necessary means of maintaining such an atmosphere. As a self-proclaimed staunch supporter of free speech, he argued that "hate speech" codes could be drawn within constitutional boundaries.

President Chace's nuanced view of hate speech codes was obviously conditioned by his position as a university president. He recounted that, as a "child of the sixties" who had been a student at Berkeley during the "Free Speech Movement," he had been a fervent supporter of unrestrained freedom of expression before he became President of Wesleyan in 1988. Shortly afterward, however, in 1990, Wesleyan experienced the most difficult year in its history. President Chace's own office was fire-bombed, he received death threats, and there were other instances of campus violence, some of them bias-related. This led to the drafting and enactment of a hate speech code in the same year. Wesleyan found that it was difficult to live without a hate speech code before 1990, and now it has found it difficult to live *with* one. The faculty is currently considering whether to adopt a revised, less restrictive code proposed by a committee of three faculty members and three students.[44] The principal purpose of the revised code is to prohibited "discriminatory harassment," which can be caused by words alone as well as by actions.

The campaign for campus hate speech codes, in President Chace's view, has been the most successful movement to restrict freedom of speech in American history, even compared with the campaign led by Senator Joseph McCarthy in the 1950's. According to Chace's statistics, 60% of American institutions of higher education have adopted codes which prohibit verbal abuse and harassment. Ironically, he observed, most students seem largely uninterested in the entire issue of campus hate speech codes, despite the raging academic debate on the subject. No one has yet been prosecuted under the Wesleyan Hate Speech Code and only a small number of students attended a recent meeting to discuss the proposed new revised code.

---

44. *See* Katherine Farrish, *Wesleyan Considers Dropping Hate-Speech Ban*, HARTFORD COURANT, Feb. 7, 1994, at A1.

In response to the urging of the other panelists, each closer to being free speech libertarians in the classical mode,[45] who asked why Wesleyan did not simply abolish its code instead of revising it, President Chace maintained that the code is a necessary part of fulfilling the university's obligation to combat "discriminatory harassment." He maintained that it could be structured in such a way so as not to unduly infringe students' free speech rights.

Other panel members expressed uncertainty about how the hate speech code would be applied, considering its terms to be rather vague. Two members of the committee which had produced the proposed revision of the Wesleyan Hate Speech Code were in the audience, but both they and President Chace hesitated to speculate on specific circumstances which could be held to violate the Code. President Chace stated that he was unable to say with certainty whether the water-buffalo incident would constitute a violation of the Wesleyan speech code, as the student disciplinary board would have to make that determination.

President Chace did ultimately offer one example of conduct which he felt would be subject to sanction: where one student follows another on campus for weeks, saying "You are a worthless Nigger and I don't want you here."[46] Because of its obligation to foster mutual respect, a basic sense of comity, and the emotional well-being of its members, Chace maintained that the academic community could curb this conduct, which amounts to "discriminatory harassment." Professor Lydia Goehr, one of the Wesleyan committee members, stated that the committee had decided not to limit the Code language to what was legally permissible, but rather to what was "theoretically and pragmatically appropriate." President Chace added that he had resisted pressure to turn the student disciplinary board, which would hear cases against those accused of violating the Code, into a judicial body making legal decisions.[47]

---

45. As Dean Macgill observed, the panel was heavily weighted on the side of "constitutional correctness" rather than "political correctness."

46. *See supra* text accompanying note 38.

47. Counsel for the University of Michigan displayed a similar reluctance to be constrained by First Amendment case law when that university was preparing its "Policy on Discrimination and Discriminatory Harassment." Counsel urged the court:

> We cannot be frustrated by the reluctance of the courts and the common law to recognize the personal damage that is caused by discriminatory speech, nor should our policy attempt to conform to traditional methods of identifying harmful speech. Rather the University should identify and prohibit that speech that causes damage to individuals within the community.

Doe v. University of Mich., 721 F. Supp. 852, 860 (E.D. Mich. 1989) (quoting Memorandum of University Attorney, Feb. 2, 1988). The district court noted, however, the Supreme Court's

Rather, he regarded it as an opportunity for a group of one's peers to determine the truth of charges made against a student and to decide whether sanctions ranging from a mild reprimand to expulsion were appropriate.

B. *Professor Nicholas Wolfson: Freedom for the Speech We Hate*

Professor Nicholas Wolfson squarely opposed government-enforced hate speech codes as merely the most recent example of repeated efforts throughout American history to ban offensive speech.[48] The ultimate result of such efforts to officially sanction currently unpopular speech, in his view, would be to exchange democracy for authoritarian rule.

Professor Wolfson squarely acknowledged that not all speech is good, or true, or noble, that speech can hurt, and that groups hurt or offended by offensive speech can always try to use the government to protect against it. Further, he disagreed with Milton's contention that truth will always vanquish falsehood in the marketplace of ideas.[49] Censors know this, he argued, and believe that they are not censoring truth, but rather combatting falsehood; the Spanish Inquisition, for example, censored what it considered to be evil statements that would lead to the damnation of souls, a form of censorship which some would endorse even today. But, he maintained, truth is a slippery and elusive concept, and notions of what is true change over time. Thus, twenty years ago, Columbus was regarded as a hero; today, many condemn him as an imperialistic villain. A century ago, Newtonian physics was considered sound, but today it is regarded as an approximation of the truth at best. Neither the principle nor the practice of censorship, Wolfson argued, can be contained. In his view, once we let governments and state-supported universities put limitations on freedom of speech and define truth, we are on the road to authoritarian or even

---

statement in *Street v. New York* that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Doe*, 721 F. Supp. at 863 (quoting Street v. New York, 394 U.S. 576, 592 (1969)). Accordingly, it found the policy unconstitutional because it was applied to penalize "serious comments made in the context of classroom discussion," *id.* at 866, in which "the free and unfettered interplay of competing views is essential to the institution's educational mission." *Id.* at 863 (citations omitted).

48. He noted that some 700 colleges and universities had enacted hate speech codes in recent years.

49. *See supra* note 21.

totalitarian control over our lives.[50]

Wolfson offered several examples of what some would consider to be artistic or intellectual forms of expression that have caused pain to certain ethnic, racial, and religious groups, and as such could be targets of restrictive speech rules: Karl Marx's book which condemned the Jews;[51] certain passages in The New Testament that can be interpreted as blaming the Jews for the death of Jesus; scholarly writings blaming the Christian tradition for the creation of conditions that led to the Holocaust;[52] and movies replete with attacks on what Hollywood considers the idiocies of right-wing religious fundamentalists. Minister Louis Farrakhan of the Nation of Islam and his deputies excoriate gays, Roman Catholics, and Jews, while Pat Robertson calls for a Christian nation and disparages other religious groups. In the 1950's, Senator Joseph McCarthy condemned Communists and any pro-Communist speech; today, we know that Communist leaders killed tens of millions of people. Do we ban all speech with a painful, even hateful, message?, Wolfson asks. To do so, he maintains, would create a civil discourse in which only words of platonic love are permitted.

Wolfson posits that one reason for the rise of hate speech codes is that "people are unbelievably thin-skinned today." As an illustration, he cited a recent article by Professor Steven Pinker,[53] which discussed the *Los Angeles Times*' guidelines banning the use by its journalists of some 150 politically incorrect terms, such as "birth defect," "Chinese fire drill," "crazy," "Dark Continent," "stepchild," "WASP," and "to welsh."[54] Pinker disagreed with the argument advanced by "language

---

50. While implicitly conceding that they are not subject to the strictures of the First Amendment, Wolfson stated that private universities might also gain from observing these principles of unfettered speech.

51. The reference is apparently to KARL MARX, ON THE JEWISH QUESTION (1844), which blamed the Jews for some of the worst excesses of the capitalist system. *See* Wolfson, *supra* note 9, at 16.

52. Cf. Lucy Dawidowicz, *How They Teach The Holocaust*, 90 COMMENTARY 25, 27 (Dec. 1990), *cited in* Wolfson, *supra* note 9, at 16.

53. Steven Pinker, *The Game of the Name*, N.Y. TIMES, Apr. 5, 1994, at A21. Steven Pinker is a Professor of Cognitive Science at the Massachusetts Institute of Technology.

54. *Cf. id.* According to Pinker,

> The Los Angeles Times' new "Guidelines on Racial and Ethnic Identification," for its writers and editors, bans [sic] or restricts [sic] some 150 words and phrases such as "birth defect," "Chinese fire drill," "crazy," "dark continent," "stepchild," "WASP" and "to welsh." Defying such politically correct sensibilities, The Economist allows the use of variants of "he" for both sexes (as in "everyone should watch his language"), and "crippled" for disabled people.
>
> One side says that language insidiously shapes attitudes and that vigilance

vigilantes" that language invidiously shapes attitudes. Words, he argued, are not thoughts; hate words do not "program" the brain, and the desperate effort to subdue the underlying concepts by suppressing or altering hate words does not work.[55] Wolfson clearly endorsed Pinker's views. He acknowledged that individuals, as an ethical matter, should respect how people wish to be addressed, but that these wishes should not be enforced by government censorship.

Lastly, Wolfson charged that efforts to draft and enforce hate speech codes constitute a form of elitism. The proponents of hate speech codes draw not-so-subtle lines with regard to which speech is "fair game" for regulation: vulgar epithets and blue-, and even white-, collar insults are forbidden, while "scholarship" that belittles a group is permitted.[56] Further, with respect to otherwise "covered" speech, application of a code's sanctions may be made to turn on the identity of the speaker: there is a "political correctness" exception to hate speech codes.[57] Thus, while Minister Farrakhan and other representatives of the Nation of Islam have spread anti-Semitic venom on campuses, there has been little effort, save recently at Emory University, to enforce hate speech codes against members of the ostensibly oppressed groups hate speech codes were intended to protect.[58]

---

against subtle offense is necessary to eliminate prejudice. The other bristles at legislating language, seeing a corrosion of clarity and expressiveness at best, and thought control at worst, changing the way reporters render events and opinions.

Id. Shelby Coffey, the Editor and Executive Vice President of the Los Angeles Times, later denied that the Guidelines banned any words. *See* N.Y. TIMES, Apr. 8, 1994, at A26.

55. According to Pinker,

> [W]ords are not thoughts. Despite the appeal of the theory that language determines thought, no cognitive scientist believes it. People coin new words, grapple for *le mot juste*, translate from other languages and ridicule or defend P.C. terms. None of this would be possible if the ideas expressed by words were identical to the words themselves. This should alleviate anxiety on both sides, reminding us that we are talking about style manuals, not brain programming.

Pinker, *supra* note 53, at A21.

56. Obviously, use of such ugly epithets as "Nigger" and "Kike" would violate most hate speech codes; they are raw and crude. Hate speech codes would not similarly purport, however, to bar the ugliest sentiments of racial and other prejudice so long as they are politely expressed in a "learned" fashion. See Wolfson, *supra* note 9, at 17. Thus, the most hateful prejudices can be communicated by "the elite" if they do not utilize epithets, even though their effect is at least as pernicious.

57. Indeed, Professor Charles Lawrence explicitly argues that hate speech codes should not penalize vilification of members of "dominant majority groups" by members of minority groups. *See infra* note 69. Mari Matsuda agrees with this. *See* Matsuda, *supra* note 16, at 2361-62.

58. Under pressure from a Jewish organization, the Canadian government took a different position when it denied entry to one of Minister Farrakhan's aides who had been invited by a black student group to speak at the University of Toronto. *See infra* note 70.

Professor Wolfson's conclusion is that, while the fighting words doctrine[59] and defamation suits can be used to combat abusive speech, in the end, an open, democratic society is "a noisy fractious society." We must rely on the old method of fighting offensive speech—i.e., with more enlightened speech. The alternative is clear: "authoritarian societies which trade free speech for the quiet of the cemetery."

C. *Professor Martin Margulies: The United States Must Avoid Canada's and Britain's Errors*

Professor Martin Margulies also opposes hate speech codes and is in favor of maximum freedom of speech. He believes that efforts to sanction "hate speech" are overly paternalistic and represent the first step towards a major loss of our liberties.[60]

Professor Margulies rejects the position, attributed by him primarily to Richard Delgado, that the term "hate speech" itself is an oxymoron because "hate speech" does not aim to (rationally) persuade the listener—is not directed at his reason, but rather at his emotions—and therefore, is not speech at all but rather conduct, which can constitutionally be restricted. According to Margulies, Delgado is a determinist, whose basic beliefs regarding the scope of free speech are antithetical to the underlying assumptions of our democratic system.

Margulies drew a connection between Delgado's past position on the "de-programming" of adult "cult members" and his present stance on hate speech codes. He noted that twenty years ago, Delgado had been the foremost academic proponent of the forcible "de-programming" of adults who joined various new religions or, as their detractors call them, "cults"; Delgado would not concede that cult members had voluntarily chosen their behaviors, values, and attitudes, but thought they had been brainwashed, and that it was, therefore, legitimate to kidnap them,

---

59. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also supra* note 25.

60. Professor Margulies claimed that if Wesleyan University were a public institution, its hate speech code would probably violate the First Amendment in that it is unclear how it would apply to various forms of behavior. Indeed, President Chace of Wesleyan University was advised by counsel for the university that Wesleyan's original hate speech code was too broad and too vague and would be unconstitutional if it had been enacted by a public institution. Farrish, *supra* note 44, at A1. Chace established the committee to review the Wesleyan Code after the decisions in the University of Wisconsin and University of Michigan cases striking down such codes. *Id. See supra* notes 28-35 and accompanying text. Wesleyan's Code, which banned "any statement or act that is intended to injure, insult or stigmatize a person or group because of race," Farrish, *supra* note 44, at A1, closely resembled the University of Michigan hate speech code. *See* Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989).

confine them, and "steal their minds back." Like current rationales for hate speech codes, this belief was premised on the idea that people of "superior insight," *i.e.* those who agreed with Delgado, are qualified and entitled to condition ("re-program") the rest of society. Margulies stated that such ideas are elitist and determinist. They stand in sinister contrast to the basic assumptions of our system, and are in conflict with the premise, noted by Justice Cardozo, that our society proceeds on the basis of a common sense belief in free will,[61] and this in turn entails respect for individual freedom and the free choices which people make.

Margulies contended that President Chace's example of clear "hate speech"[62] actually presented a "straw person" argument. According to Margulies, the behavior described was not mere speech, but assaultive, harassing conduct that the university could legitimately penalize. As long as the rule applied to all similarly opprobrious epithets, this kind of epithet would constitute "fighting words" which could legitimately be proscribed, and, hence, a far-ranging speech code was not necessary to target such behavior.[63] Margulies emphasized, however, that it would be protected speech if a student merely told another student, "You people are dumb, and you don't belong in universities. I don't want you here," so long as no "fighting words" were used.[64]

Drawing on the experiences of Great Britain and Canada, Professor Margulies painted a dismal picture of the consequences of accepting encroachments on free speech. In Britain, Margulies stated, journalists publish in fear of oppressive libel laws; the Official Secrets Act[65] targets those who seek to expose government misconduct; and there is no public forum doctrine to protect a right to public gatherings. Thus, for Margulies, free speech is reduced to its "cathartic function." Although

---

61. Justice Cardozo said that all law in the Western civilization is "guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of problems." Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

62. Chace's example of speech that he said would clearly violate Wesleyan's hate speech code was this: where one student followed another on campus for weeks saying "You are a worthless Nigger and I don't want you here."

63. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545 (1992).

64. This resembles the incident in which a University of Wisconsin-Oshkosh student was found guilty of violating the University Speech Code. The student, who had angrily told an Asian-American student: "It's people like you—that's the reason this country is screwed up" and "you don't belong here," UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1167 (E.D. Wis. 1991), was placed on probation for several months and required to participate in alcohol abuse assessment and treatment. *Id.* The student had also stated that "Whites are always getting screwed by minorities and some day the Whites will take over." *Id.* As noted above, the district court held the Code unconstitutional. *See id.* at 1181.

65. Official Secrets Act 1911 to 1989.

tourists may visit Hyde Park to listen to the "crazies" talk,[65] this merely preserves the appearance of free speech in what is essentially a restrictive country.[67]

Margulies also was critical of Canada, where there are bans on television violence, violent pornography, and hate speech.[68] Professor

---

66. Hyde Park is the place in London where by centuries-old custom, anyone can mount a "soapbox" and orate freely about any subject he wishes to passersby. Ostensibly, this constitutes the freest open public forum and it has long been regarded as vital evidence of successful British democracy. In Margulies' view, Hyde Park is only of symbolic importance and hardly compensates for the lack of constitutional protection of free speech in Britain.

67. In addition, Britain's Public Order Act of 1986 provides that

> [a] person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting is guilty . . . if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Public Order Act, 1986, ch. 64, § 18, *quoted in* Kent Greenawalt, *Insults and Epithets: Are They Protect Speech?*, 42 RUTGERS L. REV. 287, 303 n.46 (1990).

68. Canada provides an interesting contrast to the United States with respect to freedom of speech. On the one hand, its culture and its British common law legal roots are quite similar to those of the United States. But, on the other, its constitutional structure and governmental origins are quite different, in that it never revolted against the British Crown and indeed served as a refuge for American Tories who had to flee after the defeat of the British in 1781. Never having had a decisive break with Great Britain, it never had a Constitutional Convention, and its constitution remained a derivative patchwork. To remedy this situation, Prime Minister Pierre Trudeau proposed a "Canadian Charter of Rights and Freedoms," which Parliament ratified in 1981. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

The Charter's § 2 ("Fundamental Freedoms") closely resembles the First Amendment. It states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.However, the Canadian Criminal Code includes the following "hate speech" provision: "Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against an identifiable group is guilty of (a) an indictable offense and is liable to imprisonment for two years; or (b) an offense punishable on summary conviction." R.S.C. 1985, c.C-46, s.319(2) (Can.) (Criminal Code). And, unlike the First Amendment, which is framed in absolute terms, the freedoms contained in § 2 of the Charter are expressly subjected to "reasonable limits" by § 1 of the Charter, entitled "Guarantee of Rights and Freedoms": "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1 (emphasis added).

Section 319(2) of the Criminal Code is a group libel statute, and as such, it resembles the Chicago group libel ordinance which the United States Supreme Court upheld by a 5-4 vote in Beauharnais v. Illinois, 343 U.S. 250 (1952). While *Beauharnais* has not been explicitly overruled, the continued constitutionality of group libel statutes in the United States is quite doubtful, and § 319(2) would almost certainly violate the First Amendment if it were an American statute.

Margulies noted, however, that gleeful customs inspectors at the border have utilized the anti-pornography law, which was ostensibly enacted to protect women, to seize and confiscate feminist literature.[69] Thus,

---

The potential for conflict between § 319(2) and § 2 of the Charter is obvious, and it came to fruition in the case of a virulently anti-Semitic public school teacher in Alberta, James Keegstra. Keegstra, a social studies teacher in Eckville, taught his students that there was a Jewish conspiracy to take over the world through one-world government, with the Talmud as its blueprint, and that the Holocaust was a hoax. Two parents in the town complained to the authorities about Keegstra, who was indicted for willful promotion of hatred in violation of § 319(2). Regina v. Keegstra, 35 D.L.R. 4th 338 (B.C. Ct. App. 1984).

After a trial verdict of guilty and $5000 fine were reversed on appeal on procedural grounds, Keegstra was retried and again convicted, with a $3000 fine imposed. Regina v. Keegstra, 60 Atla. L.R.2d 1 (Man. Ct. App. 1988). On appeal, the Canadian Supreme Court affirmed 4-3. While the Court found that there was a violation of a Charter right under section 2, it further held that the consequent limitation on Charter freedoms was "reasonable" under § 1, since § 319(2) was so narrowly drawn that its infringement on freedom of speech was as minimal as possible and this infringement was warranted by the goal of racial harmony. Regina v. Keegstra (1990), 1 C.R. (4th) 129 (S.C.C.). *See also* Taylor v. Canada, 4 HUM. RTS. L.J. 193 (UN-Hum. Rts. Comm. 1983) (prosecution under Canadian law for recorded telephone message alleging that Jewish conspiracy would lead to financial collapse allowed), *cited in* Matsuda, *supra* note 16, at 2366 n.232; Colloquy, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1989); Kenneth Lasson, *Group Libel Versus Free Speech, When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984); Derek Raymaker & David Kilgour, *The Freedom to Promote Hate: What We Learned from Jim Keegstra and Malcolm Ross*, 41 U.N.B. L.J. 327 (1992) (Malcolm Ross was an openly anti-Semitic schoolteacher in Moncton, New Brunswick who was prosecuted for violating the New Brunswick Human Rights Act).

The contrast between the powerful and quasi-absolute kind of freedom of speech guaranteed by the First Amendment and the contingent rights and liberties protected by the Canadian Charter, whose scope remains to be determined through case law development, is plain. It is thus easy to see why those defending the constitutionality of hate speech codes in the United States have a much more difficult task than their Canadian counterparts.

69. While it is probably an ironic coincidence, the history of the University of Connecticut Hate Speech Code bears out the claim that such restrictions on speech sometimes can be used against members of the very minority groups they were intended to protect. In December, 1987, Marta Ho, an Asian-American student, and several other Asian-American students taking a university bus to a dance were spat upon and harassed by two football players, who also made racist comments. After the students protested to the university administration that no one had done anything to help them during or after their ordeal, the administration tightened the code of conduct and promised to create an Asian-American Cultural Center.

Ironically, the first student prosecuted under the new, stricter code was Nina Wu, another Asian-American student. In an apparent attempt at humor, she had posted a hand-lettered sign outside her dormitory room on campus listing four categories: "people who are welcome, people who are tolerated, people who are unwelcome and people who are shot on sight." Under the category "people who are shot on sight," Wu had written "bimbos," "Benetton bitches," "gossipers," "drunk skunks at 2:30 p.m.," "preppies," "homos," and "men without chest hair." Wu was accused of violating the code provision which forbade "posting or advertising publicly offensive, indecent or abusive matter concerning persons . . . and making personal slurs or epithets based on race, sex, ethnic origin, disability, religion or sexual orientation." She was found guilty, expelled from the dormitory, ordered to move off campus and forbidden to set

Margulies contends, contrary to the belief of Delgado and his followers, that hate speech exceptions to the First Amendment "cannot be encapsulated," or confined; "they are both symptoms and they are viruses,"

---

foot in any university dormitories or cafeterias for approximately 16 months.

Wu sued in federal court, alleging violation of her First Amendment rights, and the University of Connecticut quickly settled the case. The University agreed to delete the code section prohibiting racial and other slurs, permitted Wu to move back into the dormitory, and agreed to pay Wu's attorney's fees as well as damages. The University subsequently changed its code in a way which the Connecticut Civil Liberties Union believed was consistent with the First Amendment. The new code prohibited the face to face use of "fighting words," defined as "personally abusive epithets which, when directly addressed to any ordinary person, are in the context used and as a matter of common knowledge, inherently likely to provoke an immediate violent reaction, whether or not they actually do so." Appendix to Judgment, Proposed Consent Decree, Exhibit A, Wu v. University of Conn., No. Civ. H-89-649 PCD (D.Conn. Jan. 25, 1990), *cited in* Strossen, *supra* note 9, at 520 n.177.

Two years later, however, the University of Connecticut Trustees voted to remove even the prohibition on "fighting words" from the student conduct code; they and the University administration concluded that educating students about tolerance of minorities in the new student orientation program was more effective than speech prohibitions. *See* Jerry Adler et al., *Taking Offense*, NEWSWEEK, Dec. 24, 1980, at 48; Jackie Fitzpatrick, *Education, Not Rules, Frees Speech at UConn*, N.Y. TIMES, May 23, 1993, § 13CN, at 4; Nick Ravo, *Campus Slur Alters a Code Against Bias*, N.Y. TIMES, Dec. 11, 1989, at B1; Alex Wood, *Intolerant in Defense Of Tolerance*, JOURNAL INQUIRER, Jan. 23, 1990, at 4 (Manchester, Conn.); Alex Wood, *UConn Weighs Free Speech, Harassment—Student-Faculty Panel Discusses Ethics of Right of Expression*, JOURNAL INQUIRER, Apr. 5, 1990, at 4 (Manchester, Conn.).

Nadine Strossen states that the history of campus hate speech codes bears out "[t]he general lesson that rules banning hate speech will be used to punish minority group members . . . ." Strossen, *supra* note 9, at 557. The University of Michigan's experience is revealing. During the year the hate speech code was in effect, more than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression. *Id.* at 557-58.

Professor Lawrence recognizes the danger that hate speech codes will be invoked disproportionately against the very minority group members they are supposed to protect, and he proposes a hate speech code exception for "persons who were vilified on the basis of their membership in dominant majority groups." Lawrence, *supra* note 17, at 450 n.82. Moreover, Stanford University Law Professor Robert Rabin, chairman of the Student Conduct Legislative Council, which authored the university's hate speech code, stated that for a white student to call a black student a "nigger" would violate the code, but for a black student to call a white student a "honky SOB" would not violate the code; he justified this disparate treatment on the basis that the white majority as a whole did not need protection from discriminatory harassing speech as much as those who had suffered discrimination. *See* Strossen, *supra* note 9, at 507 n.110. As Professor Strossen points out, this proposal is not only facially unconstitutional because of its content and viewpoint discrimination, but it would also engender difficult contextual problems in defining "dominant majority groups." *Id.* at 558-59. *See also* Battaglia, *supra* note 9, at 382 n.193. As noted in note 28, *supra*, a California court recently held the Stanford University hate speech code unconstitutional.

and their enactment will result in the subversion of free speech in unanticipated ways.

D. *Should Purveyors Of Hate Be Given A Forum?*

After presenting their views on various aspects of the hate speech debate, the panelists were asked their views about a hypothetical case. Dean Macgill posited that the job of a dean or president is to foster an environment where learning can occur and all racial and ethnic groups and both genders can feel welcome. Against this background, he posed the following question: If a student group invites to campus Minister Farrakhan, American Nazis or others whose objective or effect is to inflict genuine emotional harm on part of the audience and to foster hatred and divisiveness in the community, why couldn't the campus administration exclude such speakers, whose premises are antithetical to the principles of the university?[70]

Professor Margulies answered that such speakers could not, consistently with the First Amendment, be barred from speaking on the basis of the disturbing message they brought. Although he acknowledged a "kernel of truth" in the argument he believed would be advanced in favor of refusal—that when an empowered speaker directs racist or sexist invective towards one who is disempowered, this is not a dialogue which might change minds, but rather a means of freezing stereotypes (of both superiority and inferiority) and of perpetuating power disparities[71]—he maintained that it suffers from an insurmountable

---

70. Interestingly, this is exactly what occurred recently at the University of Toronto, and the Canadian government, as Professor Margulies would have predicted, reacted by suppressing the planned speech. Khalid Abdul Muhammad, a former senior aide to Louis Farrakhan, the leader of the Nation of Islam, had created a furor when he delivered a virulently anti-Semitic speech at Kean College in New Jersey in November, 1993. In early 1994, the "Black Youth Congress," a student group at the University of Toronto, invited Muhammad to address them. Canada's Ministry of Immigration, responding to lobbying by the Canadian Jewish Congress, refused to issue a visitor's permit to Muhammad on the grounds that he had a criminal record and they had "reason to believe he would engage in criminal activities" by violating hate-crime provisions in the Criminal Code of Canada. Clyde H. Farnsworth, *Canada Bars Speech by Ex-Aide of Farrakhan*, N.Y. TIMES, May 1, 1994, at 10 (quoting TORONTO GLOBE AND MAIL, Apr. 30, 1994). The Toronto Globe and Mail attacked the government action as an assault on freedom of speech: "There is everything to be lost, and little to be gained, by such prior restraint in matters of speech: If he breaks the law, then let him face the law—after the fact, not before." *Id.* The United States Supreme Court has held that prior restraints of speech are generally unconstitutional. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 967 (1931); *see also* New York Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers case). On the Canadian Criminal Code "hate speech" provision, see *supra* note 68.

71. *See, e.g.*, Lawrence, *supra* note 17, at 452-55; Matsuda, *supra* note 16, at 2335-41 (dis-

problem: that someone must decide who is "empowered," as this is not always obvious.[72] Consequently, politicians, judges, and school officials must make these quintessentially subjective, contextual judgments. The result, in Margulies' view, is an overall loss for free speech—one which will fall most heavily on minorities who lack power. In the long run, he concludes, unfettered debate is the best hope for achieving equality among different races and ethnic groups.

Professor Wolfson also argued that such speakers should not be barred. He noted that one of Minister Farrakhan's deputies had come to the Trinity College campus in Hartford to speak and, despite great pressure, the college president had properly refused to ban him. The decision not to admit Farrakhan to speak at Emory University was, in Wolfson's view, a great mistake. Like Margulies, Wolfson noted the difficulty of operating from the premise that we can fairly and accurately identify "subjugated groups," the speech against whom should be censored, as well as the problem that banning racist speakers will engender rage among them at their exclusion. He held fast to the position that one must fight offensive speech only with more speech, not government sanction.

Attorney Elliot also responded in favor of permitting racist speakers to be heard. He added that one function of a law school is to expose students to the greatest possible diversity of intellectual experience—to facilitate the students' right to hear all points of view, under the guidance of rational and intelligent faculty members. In his view, those who favor hate speech codes tend to operate from an "inherent distrust of democracy"—they fear that people who hear hate speech will come, uncritically, to believe that the terrible things they hear are the truth. That possibility, however, according to Elliot, is a chance we must take in a democracy, and educational institutions should teach students that it is worth the risk.

Elliot indicated that he disagreed with the decision in *Chaplinsky v. New Hampshire*[73] and the entire "fighting words" doctrine which it spawned. He was opposed to the idea that one is committing harassment merely by speaking to an unwilling auditor. The university campus, he contended, ought to be a place where it is permissible to ex-

---

cussing "The Specific Negative Effects of Racist Hate Messages").

72. *See* Strossen, *supra* note 9, at 537-38. This problem is analogous to the problem of defining "dominant majority groups" under Charles Lawrence's proposal that vilification of such groups not constitute a violation of hate speech codes. *See supra* note 69.

73. 315 U.S. 568 (1942). *See also supra* note 25.

press one's views without restrictions. Errors, Elliot contended, are more likely to be corrected at a university, and offensive speech can thus be moderated, filtered and explained far more readily on campus than in the "real world."

IV. CONCLUSION

Two conclusions can be drawn from the conference. First, probably each of its participants would be in favor of penalizing the student who stalked another student with threats of physical violence and directed hateful and assaultive racist epithets at him, and second, each would likely oppose, on First Amendment grounds, punishing a student who expressed even offensive views but did so politely, without threatening imminent harm.[74] The difficult question is where to draw the line be-

---

74. For instance, a University of Michigan hearing panel unanimously found a graduate student guilty of sexual harassment after a complaint was filed against him stating that in a research class, he openly voiced his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay students to straight. Doe v. University of Mich., 721 F. Supp. 852, 865. (The student was unaccountably acquitted of the charge of harassment on the basis of sexual orientation.) The plaintiff, Doe, was himself a graduate student in the field of biopsychology, the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe sought and was granted a permanent injunction against enforcement of the University of Michigan's Hate Speech Code regulating speech. He intended to discuss in the classroom certain controversial theories positing biologically-based differences between the sexes and among the races in personality traits and mental abilities and feared that these might be perceived as "sexist" and "racist," thus violating the Code. *Id.* at 858. A guide issued by the University of Michigan Office of Affirmative Action, which was later withdrawn, gave the following example of a violation of the Code: "A male student makes remarks in class like, 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates." *Id.*

Whether or not any of these ideas are scientifically respectable or defensible, the way to combat them effectively is surely not censorship, which can only lead some to suspect that they may contain a kernel of truth which the authorities regard as dangerous. The author remembers the controversy caused twenty years ago when the Nobel Prize–winning physicist George Shockley, who dabbled in genetics and had concluded that blacks were genetically inferior to whites in intelligence, came to speak at Yale University. Yale President Kingman Brewster rejected demands that Shockley be barred from speaking but he demonstrated personally outside during the speech, carrying a placard denouncing Shockley's racist views. Similarly, a few years ago, Dean Guido Calabresi of Yale Law School, now a judge on the United States Court of Appeals for the Second Circuit, resisted demands that he deny use of the law school theater to a student group which had exhibited pornographic films there for a number of years. However, Calabresi showed his personal distaste for pornography by demonstrating against the films outside the auditorium. Similarly, President Derek Bok of Harvard University refused to suppress a letter demeaning women circulated by a student club, but he publicly condemned its contents. *See* Strossen, *supra* note 9, at 562 n.400. Such leadership can be influential in setting a tone of decency and mutual respect on campus, whereas the use of force to repress or bar certain speakers or forms of speech might lead to the impression that respectable intellectual arguments to combat such ideas are lacking.

tween these extremes, so as to put all those subject to penalties under a code on notice as to precisely what conduct would violate it. One can sympathize with the evident desire of President Chace and Professor Goehr of Wesleyan University to avoid litigating hate speech cases in court, preferring to resolve any disputes within the academic community. The time is long past, however, in which a college or university could expect that courts would totally defer to their administrative wisdom and refrain from considering the claims of students penalized for violating institutional rules.[75] Due process demands that codes of conduct clearly and precisely indicate what is forbidden and punishable.[76]

> Professor Rodney Smolla reaches a similar conclusion in his treatise on hate speech:
> [Outside of cases posing a clear and present danger of violence, or involving actual discriminatory conduct,] . . . the battle against hate speech will be fought more effectively through persuasive and creative educational leadership rather than through punishment or coercion. The conflict felt by most administrators, faculty, and students of good will on most American campuses is that we hate hate speech as much as we love free speech. The conflict, however, is not irreconcilable. It is most constructively resolved by a staunch commitment to free expression principles, supplemented with an equally vigorous attack on hate speech in all its forms, emphasizing energetic leadership and education on the academic values of tolerance, civility, and respect for human dignity, rather than punitive and coercive measures.

SMOLLA & NIMMER, *supra* note 5, at § 6.02(5)(e).

Other extreme instances of enforcing hate speech codes verge on silliness. For example, the University of Connecticut issued a proclamation banning "inappropriately directed laughter" and "conspicuous exclusion of students from conversations." Adler et al., *supra* note 69, at 48. Such strictures are unenforceable. They intrude excessively on students' rights of privacy and freedom of association. While they attempt to promote what are perhaps laudable goals of social inclusiveness, they do so through ineffectual means and thereby threaten to trivialize hate speech codes' important goals of combating genuinely vicious speech.

75. The Supreme Court itself has authorized judicial review of decisions formerly left to the academic discretion of school officials. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975).

76. The Supreme Court has long recognized that vague provisions in statutes and rules that carry punishment for infraction violate due process:

> [T]hat the terms of a penal statue creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *accord* Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973). The vagueness doctrine is especially important in First Amendment cases:

> In the First Amendment area, the Supreme Court has traditionally applied the vagueness doctrine with special exactitude, because of the chilling effect that vague laws may have on protected expression. Those "sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."

In the wake of *R.A.V.*,[77] any public university hate speech code which goes far beyond a narrow proscription of "fighting words" is vulnerable to a successful constitutional challenge, and even prohibition of "fighting words" is constitutionally suspect.

In the author's view, the proponents of hate speech codes have failed to make the case for the proposition that they are either desirable or constitutional, and their opponents have incisively indicated the dangers they present. As Professor Wolfson demonstrated, there is no way to contain the principle of suppression of hate speech; once adopted, this principle can and will be extended to restrict much that is good and worthwhile. In addition, rules for suppressing hate speech are necessarily invidious and elitist, so that even while proscribing crude racial and ethnic epithets, they will be unable to combat more subtle and more politely expressed forms of bigotry. Professor Margulies showed that any system of hate speech codes would inevitably promote the arbitrary and tyrannical power of officials and thereby lessen the power and liberty of those disenfranchised groups it was intended to protect. Ultimately, one cannot destroy even evil ideas by attempting to suppress them; instead of assuming that those exposed to verbal poison will succumb to it, we must have faith in the rational powers of people to understand that it is poisonous, and in their basic decency in exercising the will to reject it. The opposite, determinist view, is inconsistent with the premises of our free society.

On balance, the consensus seems to be that hate speech codes are both ill-advised and ineffective in promoting the laudable goals of intergroup harmony and respect for others, which can best be advanced if

---

SMOLLA & NIMMER, *supra* note 5, § 3.06(3)(b) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). *See also* Smith v. Goguen, 415 U.S. 566 (1974); Stromberg v. California, 283 U.S. 359 (1931). The district court in *Doe v. University of Michigan* noted that "a statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it." Doe v. University of Mich, 721 F. Supp. 852, 866 (citing Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973)). The University of Michigan failed this test, according to the district court:

> [T]he University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause.

Id. at 867. By their reluctance to specify what kind of conduct would violate the Wesleyan Hate Speech Code, Wesleyan President Chace and Professor Goehr were leaving themselves open to similar charges that the Wesleyan Code was void for vagueness.

77. 112 S. Ct. 2538 (1992).

leaders of the campus community set a humane example by speaking out vigorously and forthrightly to condemn bigotry whenever it appears.